

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

BENSLEY CONSTRUCTION, INC.  
on its own behalf and on behalf of all others similarly  
situated,

Plaintiff,

v.

MARSH & MCLENNAN COMPANIES, INC.,  
MARSH, INC., ACE USA, ACE INA, AMERICAN  
INTERNATIONAL GROUP, AMERICAN RE-  
INSURANCE COMPANY, ARTHUR J.  
GALLAGHER & CO., HILB ROGAL & HOBBS,  
COMPANY, WILLIS GROUP HOLDINGS, LTD.,  
WILLIS NORTH AMERICA INC., WILLIS GROUP  
LTD., UNIVERSAL LIFE RESOURCES,  
UNIVERSAL LIFE RESOURCES, INC. (d/b/a ULR  
INSURANCE SERVICES, INC.), THE CHUBB  
CORPORATION, USI HOLDINGS, INC., METLIFE,  
INC., PRUDENTIAL FINANCIAL, INC.,  
UNUMPROVIDENT CORPORATION, THE ST.  
PAUL TRAVELERS COMPANIES, INC., ZURICH  
AMERICAN INSURANCE COMPANY, LIBERTY  
MUTUAL GROUP INC., LIBERTY MUTUAL  
INSURANCE COMPANY, LIBERTY MUTUAL  
FIRE INSURANCE COMPANY, EMPLOYERS  
INSURANCE COMPANY OF WAUSAU, and ST.  
JAMES INSURANCE COMPANY LTD.,

Defendants.

Civil Action No. 05 11249 GAO

## **MOTION TO RE-SCEDULE HEARING**

The undersigned Defendants, Marsh & McLennan Companies, Inc. and Marsh, Inc. (collectively “Marsh”) ACE USA, ACE INA, American International Group, American Re-Insurance Company, Arthur J. Gallagher & Co., Hilb Rogal & Hobbs, Company, Willis Group Holdings, Ltd., Willis North America Inc., Willis Group Ltd., Universal Life Resources, Universal Life Resources, Inc. (d/b/a ULR Insurance Services, Inc.), U.S.I. Holdings Corp., MetLife, Inc., Prudential Financial,

Inc., UnumProvident Corporation, the St. Paul Travelers Companies, Inc., and Zurich American Insurance Company (collectively "the Defendants") in light of certain more recent developments and in the interests of judicial economy and efficiency, hereby request, pursuant to LR. 40.3(A), that this Court defer the hearing currently scheduled for December 13, 2005 for a period of approximately forty-five (45) days following the Judicial Panel on Multidistrict Litigation's ("JPML") next currently scheduled hearing date.<sup>1</sup> As to these grounds therefore, Defendants state as follows:

**Final Transfer of This Action Will Shortly Be Fully Briefed; A Decision by the JPML Should Be Forthcoming Early Next Year**

1. On October 4, 2005, following the completion of briefing on the motions set for the scheduled December 13, 2005 hearing, a Conditional Transfer Order was entered by the JPML formally transferring this matter to MDL-1663 (the "MDL Action"). *See* Notice of the Judicial Panel on Multidistrict Litigation's Issuance of a Conditional Transfer Order (filed Oct. 6, 2005). Both the Plaintiff and the Liberty Defendants<sup>2</sup> moved to vacate that Order. Defendants filed their opposition to those Motions last week and Plaintiffs and the Liberty Defendants are due to file reply briefs this week. Accordingly, as of this week, the parties will have fully briefed to the JPML the issue of whether final transfer to the MDL Action is appropriate. *See* Notice of Filing Opposition to Plaintiff's Motion to Vacate October 4, 2005 Conditional Transfer Order (hereinafter "Notice of Opp. to P.'s Mot."), and Notice of Filing Opposition to Liberty Mutual's Motion to Vacate Conditional Transfer Order

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<sup>1</sup> The JPML Clerk's office has informed Counsel that the JPML is next scheduled for a hearing in January. The exact date has not yet been set.

<sup>2</sup> The Liberty Defendants include Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, Employers Insurance Company of Wausau, and St. James Insurance Company Ltd.

(both filed Nov. 23, 2005). Defendants understand that it is the pattern and practice of the JPML to rule on final transfer issues within thirty (30) to forty-five (45) days of a scheduled hearing date. The next scheduled JPML hearing date is in January. *See supra* n.1. Given that the final transfer issue will be fully briefed this week and presented to the JPML for hearing in January, Defendants submit that it would be prudent to briefly defer the hearing rather than burden the Court and the parties with the currently scheduled December 13, 2005 hearing.<sup>3</sup>

**Issues That Are the Subject of the Pending Motions Are, or Will Shortly Be, Before the MDL Court**

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2. The prudence of a brief deferral is amplified by the fact that, as set forth in Defendants' Oppositions to both Plaintiffs and Liberty Mutual's Motions to Vacate, which are incorporated herein by reference, the MDL Action has or will have pending before it the very same issues that this Court would be compelled to consider should it go forward with the hearing on the Motion to Remand or the Liberty Defendants' motions to dismiss. These developments are the result of the transfer to the MDL Action of cases that raise the same issues that would be before the Court on December 13, 2005. As noted in Defendants' Oppositions, the Florida *Palm Tree* Action,<sup>4</sup> filed by the same counsel who represent the plaintiff in this matter, raises some of the same CAFA questions presented by the Motion to Remand. In addition, as noted in those Oppositions, other cases transferred to the MDL Action raise similar issues related to fraudulent joinder and diversity jurisdiction. *See* Notice of Opp. to P.'s Mot., Ex. A, pp. 13 to 17. Further, per the

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<sup>3</sup> Defendants undertook efforts to expedite the matter so that the issue of final transfer could be fully briefed and presented to the JPML at its last hearing on November 18, 2005. Expedited briefing, however, required plaintiff's consent, which was not forthcoming.

<sup>4</sup> The complaint and certain Oppositions to Remand in *Palm Tree* have been previously attached for this Court's reference as Exhibits A, E, and F to the Motion to Stay This Action Pending a Determination on Transfer by the Judicial Panel on Multidistrict Litigation.

MDL Court's Order, the Liberty Mutual defendants will be filing Motions to Dismiss in the MDL Action on or before November 29, 2005. In sum, as the result of recent transfer orders that have issued, or will shortly issue, from the JPML, and the Scheduling Order in MDL-1663, the CAFA and fraudulent joinder issues that are the subject of the Motion to Remand, and the issues raised by the Liberty Defendants' motions to dismiss will all need to be addressed by Judge Hochberg in the MDL Action. On this further ground, Defendants submit that it is both prudent and efficient to await the transfer decision so as to avoid duplication of effort and the prospect of inconsistent rulings on these issues.

3. The December 13, 2005 hearing in this Court is scheduled on the Motion to Stay, various Liberty Defendant Motions to Dismiss, the Motion to Remand, and the Motion to Substitute Party / Representative Plaintiff and For Leave to File a Second Amended Complaint. *See* Order Setting Hearing of Oct. 26, 2005. It is now clear that the MDL Court will hear these same issues. If the JPML finalizes its order transferring this Action to the MDL Action, this Court will not need to attend to the burdensome and potentially complex issues raised by those motions. Defendants note that other similarly situated courts have deferred action on motions to dismiss or remand given the pendency of a transfer decision. *See* Notice of Opp. to P.'s Mot. Ex. N-P (Stay Orders in *Slay*, *Cameron Offshore Boats Slay*, and *Emerson*). To best serve the goals of judicial economy and efficiency and to avoid the prospect of inconsistent decisions, Defendants respectfully submit that this Court should defer a hearing on the pending motions until forty-five (45) days following the JPML's next scheduled hearing.

For the foregoing reasons, the undersigned Defendants respectfully request that this Court defer the December 13, 2005 hearing until approximately forty-five (45) days following the JPML's next scheduled hearing.

Dated: November 30, 2005

Marsh & McLennan Companies, Inc., and Marsh Inc., on their own behalf and on behalf of and with the consent of ACE USA; ACE INA; Zurich American Insurance Company; American International Group, Inc.; American Re-Insurance Company; Arthur J. Gallagher & Co.; Hilb Rogal & Hobbs, Company; Willis Group Holdings, Ltd.; Willis North America Inc.; Willis Group Ltd.; Universal Life Resources; Universal Life Resources, Inc. (d/b/a ULR Insurance Services, Inc.); USI Holdings Corp.; MetLife, Inc.; Prudential Financial, Inc.; UnumProvident Corporation; The St. Paul Travelers Companies, Inc.,

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)**

The undersigned hereby certifies that counsel have conferred and have attempted in good faith to resolve or narrow the issue presented by the accompanying motion prior to the filing of said motion.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following by hand-delivery, electronic notice, and/or first-class mail on November 30, 2005:

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